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April 4, 1985

Special Master Crane Winton
1307 Mt. Curve Avenue
Minneapolis, MN. 55403

HAND DELIVERED

Re: U.S. et al. v. Reilly Tar & Chemical Corp. et al.
Civ. No. 4-80-469

Dear Special Master Winton:

We are writing this letter in anticipation of the meeting you have scheduled with the parties for 9:30 a.m. on Thursday, April 4, 1985. We understand that the purpose of that meeting is to discuss the progress the parties are making towards settling this litigation and the assistance which you may provide in that regard. This letter is intended to provide you with background information regarding the status of settlement negotiations to date. We, therefore, divide this letter into two parts: (1) a brief explanation of the history of settlement negotiations and of the structural framework of the proposed settlement documents and (2) a discussion of the issues, both resolved and unresolved, which in the State's view must be addressed in the settlement documents.

BRIEF EXPLANATION OF THE HISTORY OF SETTLEMENT NEGOTIATIONS AND THE STRUCTURAL FRAMEWORK OF THE PROPOSED SETTLEMENT DOCUMENTS

Since May, 1983, the parties to this litigation have made several attempts to settle this matter. For at least the last year, settlement negotiations have centered around a "Consent Decree" and attached "Remedial Action Plan" (RAP) which, from the perspective of the State and the United States, would establish all the terms of the parties' settlement. 1/

1/ From Reilly's perspective, its settlement of the litigation includes another element, a separate agreement between it and the City of St. Louis Park. Reilly desires to enter into this separate agreement as a means of assigning some of its responsibilities under the Consent Decree and RAP to the City. As to the impact of this separate agreement on proposed settlement negotiations, see further discussion in footnote 2 which accompanies the text of this letter infra at page 3.

The Consent Decree is the superstructure of the settlement package -- it describes the basic requirements, both substantive and procedural, and resolutions of the parties (e.g., permit requirements, covenant not to sue, resolution of disputes, reimbursement of expenses). The RAP is the substructure of the agreement: it sets out a detailed description of the actual work which must be accomplished at and in the vicinity of the site to remedy the identified pollution problems.

On Wednesday, March 27, 1985, Reilly served the State with a set of documents Reilly identified as an "Offer of Judgment." This set of documents includes, among other things, Reilly's latest proposal regarding the terms of the Consent Decree and RAP which the State and the United States have been negotiating with Reilly for the past year and a half.

Where valid, Offers of Judgment change the nature of settlement negotiations in that they put plaintiffs at risk of having to pay defendants' costs if the judgment ultimately obtained by plaintiffs is not more favorable than defendant's Offer of Judgment. Thus, before describing the specific terms of Reilly's "Offer of Judgment" and the State's response, the State feels compelled to briefly respond to Reilly's efforts to invoke the "Offer of Judgment" rule, Fed. R. Civ. P. 68.

Fed. R. Civ. P. 68 allows a defendant to serve, within a specified time period, "an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued." To be valid, the offer of judgment must be "unconditional." 12 Wright & Miller, Federal Practice and Procedure: Civil § 3002 at 57 (1973). Further, the application of Fed. R. Civ. P. 68 to award costs to a prevailing defendant is not appropriate in all cases. E.g., Gay v. Waiters' and Dairy Lunchmen's Union, Local No. 30, 86 F.R.D. 500 (N.D. Calif. 1980).

Reilly's attempt to invoke Fed. R. Civ. P. 68 against the State should be rejected at the outset as inapplicable to this litigation. Many of the issues raised in this case are matters of first impression; resolution of these issues involves complex new statutes and sophisticated technological analyses. In addition, settlement of the case does not turn simply on the award of a specified amount of money, but on the resolution of an appropriate injunctive remedy for the contamination problems emanating from the former Reilly site. Under these circumstances, it must be concluded, even if the State were to do "less favorably" at trial, that Fed. R. Civ. P. 68 does not apply.

Second, even if the Court were to conclude that the rule would apply if the Offer of Judgment were properly made, Reilly's offer violates the fundamental requirement that the offer be unconditional. In specific, Reilly's Offer of Judgment includes three parts. The first part (the Consent Decree and the RAP) is to be signed by all parties; the second part (a separate agreement in which some of Reilly's responsibilities under the Consent Decree and the RAP would be assigned to the City) is between only Reilly and the City of St. Louis Park; and, the third part (Stipulated Order for Dismissal of the litigation still pending in State Court) is among the parties to the State court litigation.

Reilly requires that this three part offer "be accepted by each and every [plaintiff, intervening plaintiff and cross-claimant] before it is deemed accepted". Reilly Offer of Judgment at 2. Thus, by its own insistence, Reilly's offer to the State (the Consent Decree and the RAP) is conditioned upon the willingness of another party to execute a separate agreement with Reilly. The State has no control over the City's willingness to execute this agreement; indeed, the State considers the issues raised by Reilly's proposed agreement with the City to be matters solely between the City and Reilly. 2/ Thus, until either (1) the City and Reilly agree on the terms of their separate agreement or (2) Reilly is willing to execute the Consent Decree and RAP with the other parties regardless of the status of its negotiations with the City, Reilly's offer to the State is conditional and fails to meet the requirements of a Rule 68 Offer of Judgment.

Despite the inapplicabilty of Rule 68 to Reilly's offer, the State has given serious consideration to the offer. After due consideration, the State has concluded that the offer is unacceptable for the reasons articulated above and in the remainder of this letter. To assist the Court in understanding these reasons and, further, to enable the Court to facilitate the parties' attempt to settle this case, the State provides in the remainder of this letter an explanation of its position on the individual parts of the remedy needed for the contamination problem in St. Louis Park. The following explanation is provided soley for settlement purposes and is not intended to indicate any intention on the part of the State to be limited in its prayer for remedy before the Court.

2/ It should be noted that the State does not object in concept to Reilly's desire to assign some of its responsibilities to the City as long as the Consent Decree clearly provides that Reilly remains the guarantor of the requirements of the Consent Decree and the RAP in the event that an assignee fails to undertake and/or complete requirements assigned to it.

DISCUSSION OF THE ISSUES TO BE ADDRESSED IN THE SETTLEMENT DOCUMENTS

1. General observation regarding settlement discussions in this matter

Before discussing the specific elements of settlement documents, it is useful to explain the State's view of its duties under MERLA and CERCLA and the way in which work done to fulfill those duties may alter the circumstances underlying settlement discussions.

Both MERLA and CERCLA establish funds through which clean up can be accomplished even while litigation is in process to remedy a contamination problem at a site. Thus, the relief sought in that litigation, or in a settlement to the litigation, may be transformed from an injuction to restitution while the litigation is in progress. This transformation is not only consistent with MERLA and CERCLA, but is compelled by the fundamental premise of those laws: clean up first, litigate liability later.

In facilitating the parties' attempt to reach a settlement of this litigation, the Court therefore should be aware of two principles which guide the State: (1) the State is interested in pursuing all reasonable settlement proposals from Reilly; and, (2) it is possible that proposals which two months ago may have represented potential options for resolving the case may no longer be available because of a change in circumstance. An example of such changes in circumstance may be helpful. Approximately one month ago, Reilly informed the State and the United States that it would not be designing and constucting a granular activated carbon ("GAC") treatment system to pump and treat the ground water from specified wells such that that water can be distributed into the drinking water system for St. Louis Park. Previous settlement proposals had provided Reilly with the option of submitting a design to the governments for their approval and then constructing the treatment system according to the approved design. Now that Reilly has stated that it is unwilling to move forward to undertake the work itself at this time, the State and the United States have proceeded to have this work accomplished using federal superfund monies. Thus, the governments are no longer willing to entertain Reilly's proposal that it design and construct the GAC system. Instead, the governments are interested in reimbursement for the work they are performing. 3/

3/ See further discussion infra at 8 regarding the GAC treatment system.

There are several instances in which Reilly's proposed offer suggests Reilly will undertake work which the governments are now in the process of performing. As time passes and no settlement is reached, the governments expect that more and more of the remedy needed at the Reilly site will be accomplished with government funds, making the question for settlement a money issue rather than an injunctive issue. The Court, and Reilly, should be aware that the terms of the relief being sought by the governments, and the scope of the settlement negotiations, have changed and will continue to change as government clean up proceeds.

2. General overview of the Portions of Reilly's Offer of Judgment Directed to the State

As mentioned supra at 1, settlement negotiations for the past year and a half have centered around a Consent Decree and an attached RAP ("Remedial Action Plan"). These two documents form the basic agreement between the State, the United States and Reilly. An outline description of these documents may assist the Court in familiarizing itself with the status of settlement in this case.

The Consent Decree is structurally similar to the settlement documents which the MPCA has negotiated in several other superfund matters (including settlements of litigation and pre-litigation settlements.) The form of the Consent Decree proposed by Reilly on March 27, 1985, was presented more than a year ago during settlement negotiations with Reilly. As stated earlier, the Consent Decree is the superstructure of the settlement -- it describes the basic requirements of settlement and the procedural implementation of these requirements. It includes terms such as "Resolution of Disputes, Permit Requirements, Reimbursement Requirements, Covenant Not to Sue." While the State is not in full agreement with the Consent Decree language presented by Reilly, it expects that the more difficult settlement issues relate to the specific clean up requirements for the Reilly site.

These clean up requirements are set out in the RAP, which is appended to the Consent Decree as Exhibit A. Like the Consent Decree, the RAP is structurally similar to other RAPs which the MPCA has negotiated in other superfund matters. Also like the Consent Decree, the form of the Reilly RAP, and some of its terms, were established more than a year ago during settlement negotiations with Reilly. In considering the purpose of the RAP, the Court should understand that the RAP is the detailed description of what work must be accomplished at the site to remedy the identified pollution problems.

As it is currently drafted, the RAP is divided into the following twelve components and one appendix:

a. Definitions

b. General Provisions

c. Sampling and Quality Assurance

d. Drinking water treatment system at SLP 10/15

e. Mt. Simon-Hinckley Aquifer

f. Ironton-Galesville Aquifer

g. Prairie du Chien-Jordan

h. St. Peter Aquifer

i. Drift-Platteville Aquifer

j. Leaking multi-aquifer wells

k. Near-surface contamination

l. Contingent drinking water treatment

m. Appendix A: PAH Compounds to be monitored

Since the major issues in settlement will likely turn on the parties' ability to resolve differences regarding the appropriate remedial action for the Site, the remainder of this memorandum will focus on the specific requirements of the RAP.

3. Discussion of the terms of the RAP, highlighting areas of disagreement

The following discussion of the thirteen components of the RAP is intended to provide the Court with: (1) a brief description of the reasons for each of those components; (2) an explanation of the major issues, in the State's view, left unresolved or unsatisfactorily resolved by Reilly's proposal; and, (3) a statement of the State's response to Reilly's proposal. This list of issues is not intended to be inclusive of all the areas of disagreement between Reilly and the State regarding the terms of the proposed settlement. For example, issues of timing exist as to many of the components of Reilly's proposed RAP.

a. DEFINITIONS

(1) Brief Description. The first section of the RAP (section 1) contains a set of definitions which apply to the provisions of the RAP.

(2) Explanation of Major Issues. One issue which remains is the definition of the term "carcinogencic PAH." This definition ties both part 1.2 and Appendix A to each other. Among the other problems which the State has with this definition is Reilly's apparent unwillingness to recognize the fact that scientific evidence as to the carcinogenic nature of the substances at issue changes as more data is developed, more experiments are conducted, or more sophisticated analyses become available. The

(3) State's Response. The State wants the definition of "carcinogenic PAH" (or some other provision in the Consent Decree) to clearly indicate that the governments may add PAH carcinogens to the list as new information develops. The settlement must have sufficient flexibility to assure protection of public health from newly documented dangers.

b. GENERAL PROVISIONS

(1) Brief Description. The second section of the RAP contains a series of provisions which describe requirements generally applicable to other sections of the RAP. For instance, section 2.1 describes the well numbering system used in the RAP and section 2.2 describes the drinking water criteria and advisory levels.

(2) Explanation of Major Issues. Section 2.9 of Reilly's proposed RAP assigns all Sewer Availability Charges (SAC) charges to the State. SAC charges could be incurred if water pumped from wells as part of the remedial action described in other portions of the RAP is discharged into the sanitary sewer system for treatment at the Metropolitan Waste Control Commission's plant. Current estimates for SAC hook-up charges suggest that these costs could be greater than $ 160,000.

An important issue as to the drinking water criteria set out in section 2.2 also is raised by Reilly's RAP. As proposed by Reilly, the Commissioner of the Minnesota Department of Health would be authorized to require that use of wells exceeding certain criteria be discontinued until such time as criteria are met "at the point at which the water in question is introduced to the water supply distribution system." This language appears to allow for meeting criteria by dilution. See similar issue described in section 12, below.

(3) State's Response. The State is not willing to assume any of the SAC charges for sewer hook-ups and considers Reilly's proposal unreasonable. The State also objects to the language "at the point at which the water in question is introduced to the water supply distribution system" since it considers dilution to be an unacceptable solution to pollution of public water supplies.

c. SAMPLING AND QUALITY ASSURANCE

(1) Brief Description. The third section of the RAP contains a description of the sampling and quality assurance requirements which are part of the remedial invesigations and monitorings of the Reilly site.

(2) Explanation of Major Issues. None.

(3) State's Response. There appears to be fundamental agreement as to the terms of this provision.

d. DRINKING WATER TREATMENT SYSTEM AT SLP 10/15

(1) Brief Description. In its offer, Reilly suggests that it "shall develop and submit . . . a complete design, including plans and specifications, for the construction of a granular activated carbon (GAC) treatment system at the St. Louis Park municipal drinking water wells SLP 10 and SLP 15." A "granular activated carbon treatment system" is a filtration system for the removal of trace organic contaminants. Simplistically described, it consists of tanks filled with activitated carbon and a pumping system which conveys water through the carbon bed whereupon the contaminants are adsorbed onto the carbon and thereby removed from the water. The water would then be pumped into the distribution system for the City's use.

(2) Explanation of Major Issues. As mentioned supra at 4, Reilly had proposed to design, construct and operate a GAC system. In August, 1984, the United States formally asked Reilly to build the GAC system. Reilly informed Judge Magnuson and the parties to this litigation at the pre-trial conference conducted last September that it "could have the GAC system constructed by December, 1984." Reilly gave neither the United States nor the State any reason to doubt its intentions to go forward with the design and implementation of the GAC system, until approximately one month ago when Reilly stated that it did not intend to construct GAC at this time. The governments are now undertaking the design and construction of the system using federal funds.

(3) State's Response. The governments are unwilling to postpone designing and installing GAC at SLP 10/15 and intend to move forward during these negotiations to complete the design and construction of such a system. The State remains willing to

consider Reilly's reasonable proposals on this element of the that the governments are moving forward to have the GAC system completed as rapidly as possible.

(e) MT. SIMON-HINCKLEY AQUIFER

(1) Brief Description. There are five aquifers beneath the Reilly site and Hopkins and St. Louis Park. In increasing order of depth, these are: (1) Drift-Platteville; (2) St. Peter; (3) Prairie du Chien/Jordan; (4) Ironton-Galesville; and, (5) Mt. Simon-Hinckley. In the view of the governments, contamination from the Reilly site exists in all five of these aquifers to varying extents. The extent and magnitude of such contamination varies as does the adequacy of the data base available for each aquifer. All aquifers except the Drift-Platteville and Ironton-Galesville currently serve as drinking water supplies in St. Louis Park and Hopkins. From the State's perspective, the remedial action plan must be designed to address the contamination for each of the five aquifers.

As to the Mt. Simon-Hinckley, Reilly proposes to "monitor SLP 11, 12, 13, and 17" and, if the results of any of the required monitoring "is greater than the advisory level or drinking water criteria for" specified contaminants, Reilly "shall comply with the applicable requirements of Section 12." Section 12 describes monitoring requirements for drinking water wells found to be contaminated and describes the procedure for "dealing with" municipal drinking water wells which are found to be "contaminated" as described in Section 12.2.1.

(2) Explanation of Major Issues. Reilly's proposal establishes a "wait and see" requirement. It basically ignores the fact that heavily contaminated ground water was found in W23 which had been open to the Mt. Simon-Hinckley aquifer.

(3) State's Response. The State has reason to believe that this aquifer is contaminated, although the areal extent and magnitude of that contamination is not presently known. Because the State believes that sufficient information exists to support a conclusion that the Mt. Simon-Hinckley is contaminated, the State concludes that the proper remedy for this aquifer is the design and implementation of a "Remedial Investigation" the purpose of which would be to fully describe the extent and magnitude of the contamination. Once this has been defined, the next appropriate step would be the design and implementation of a remedy (e.g., clean up or containment) for that contamination. However, for purposes of settlement only, the State is willing to entertain Reilly's suggestion that remedial action be postponed until further monitoring demonstrates that specific wells ending in the Mt. Simon-Hinckley are contaminated. Although the State

does not intend to be so limited in its prayer for remedy before the Court, the State would be willing to consider Reilly's proposal regarding this aquifer if (1) all other terms to the Consent Decree are acceptably resolved and (2) section 12.2.1. (the trigger for action in the Mt. Simon-Hinckley) is acceptably modified. (see discussion, infra.)

(f) IRONTON-GALESVILLE

(1) Brief Description. This is one of the two aquifers which is not itself used as a drinking water supply. However, contamination can move between aquifers. Further, the Ironton-Galesville is, in its uncontaminated areas, suitable for drinking water even though it is not so currently used.

As to the Ironton-Galesville aquifer, Reilly proposes (1) to monitor Well 105; (2) to undertake contingent actions for drinking water supply wells that withdraw water from the Ironton-Galesville aquifer if installed within one mile of the site and analytical results from that well show levels of PAH in the water in excess of specified levels; and, (3) to reimburse private persons for the incremental costs associated with providing additional safeguards which the MDH Commissioner requires for well installation.

(2) Explanation of Major Issues. Well 23 was the main supply well at the site used by Reilly during its operations. In 1982-83, the State, through a federal superfund grant, had W 23 cleaned out. During this process, it was discovered that a large plug of coal tar-like material was present in the well. The coal tar plug itself was in direct contact with the Ironton-Galesville aquifer. After it was cleaned out, W 23 was temporarily reconstructed to be open to only the Prairie du Chien aquifer. (Previously, it was open to all five aquifers.)

Well 105 was the supply well used by the Minnesota Sugar Beet Company at the turn of the century and also was used as a backup supply well by Reilly (after it purchased the Sugar Beet property) until 1932. Existing data demonstrate W 105 to be contaminated with levels of PAH which far exceed drinking water criteria. Despite this fact (and the fact that the plug which was in W23 was in direct contact with this aquifer), Reilly only proposes to "monitor W 105" for two years and does not propose to conduct any remedial investigation or action if further monitoring confirms the already well-established fact of contamination. As to reimbursement of expenses, Reilly limits reimbursement to persons who apply "to the MDH for a permit to install a new well."

(3) State's Response. The State, as custodian of the natural resources of the State, disagrees with Reilly's perspective that no remedy for contaminated ground water is needed unless that ground water currently serves as a drinking water supply. Thus, the State takes issue with Reilly's approach to the Ironton-Galesville since that approach provides for further monitoring of an already contaminated well but no remedy. As with the Mt. Simon-Hinckley, the State believes that the appropriate remedy for this aquifer is the following: (1) Design and implementation of a remedial investigation to describe the full extent of contamination in this aquifer; (2) Design and implementation of a feasibility study to consider alternative options for remedying the contamination; and, (3) Design and implementation of a selected alternative to remedy the contamination. For purposes of settlement only, the State may be willing to entertain Reilly's suggestion that investigation and remedial action be more limited.

(g) PRAIRIE DU CHIEN-JORDAN

(1) Brief Description. Remedial action in the Prairie du Chien-Jordan is somewhat different than for the other aquifers. It involves (1) removal of a continuing source of contamination (W 23); (2) containment of contamination through a gradient control system; and, (3) contingent actions in the event additional wells become contaminated.

(a) Removal of Source at W 23

Reilly proposes to submit a plan to reconstruct W 23 as a "pumping well." As used in this sense, a pumping well is neither a monitoring well nor a supply well. Rather, it is a well from which water from the Prairie du Chien aquifer will be pumped to the surface. The purpose of pumping this water is to remove an area of highly contaminated water. Reilly proposes to pump W 23 at a monthly average of 50 gallons per minute until specified criteria are met. Reilly proposes to discharge this water to the sanitary sewer system, and in section 2, assigns the costs of hook-up to that system to the State.

(b) Gradient Control System

A gradient control system consists of (1) pumping wells at a rate which adjusts the capture areas of the wells such that contamination in a given area is contained and (2) monitoring wells within and near the capture area to allow for measurement of water quality and water levels so that it can be determined whether the pumping system is achieving the desired containment or requires modification. One unresolved issue with respect to the gradient control system proposed for the Prairie du Chien is

where to discharge the substantial quantities of water which would be pumped from the well or wells.

(c) Contingent Actions

In the parties' best estimates based on current information, it is expected that the proposed gradient control system will limit the spread and control the existing zone of contamination beneath and in the vicinity of the former Reilly plant site. The contingent actions clause in Reilly's proposal provides a mechanism for responding to the possibility that the parties' best estimates are not fully realized. Thus the contingent actions clause provides for three contingencies: (1) First, if the gradient control system does not adequately control the existing zone of contamination, the State and the United States may require Reilly gradient control system modifications "in order to protect actual or potential uses of the aquifer for drinking water supplies;" (2) Second, Reilly's proposal recognizes the possibility that the pumped water will exceed criteria which would allow the water to be discharged without treatment to surface waters. In the event such criteria are exceeded, Reilly shall treat the water in accordance with a plan it shall submit for review and approval; (3) Third, Reilly's proposal describes additional monitoring or remedial action. The contingency provision described in this clause triggers section 12 requirements.

(2) Explanation of Major Issues.

Several issues exist regarding the RAP for this aquifer; only a few of the more important issues are described below:

(a) Source at W 23: The sole major issue with respect to this matter is Reilly's suggestion that the State pay the SAC charges for sewer hook-up.

(b) Gradient Control. A gradient control system must include monitoring wells which are used to find the best locations for control wells and to assess performance of the gradient control system. Where existing wells are properly located and constructed, they may be used. Where no such wells exist, they must be installed. Several issues exist as to the monitoring Reilly proposes to conduct for the gradient control system. An additional issue exists as to guarantees that private industrial wells be pumped at historical rates to ensure proper operation of the gradient control system.

(c) Contingent Actions. Reilly proposes to make the trigger for the contingent actions the need to "protect actual or potential uses of water supplies." An issue exists as to whether

actions should be undertaken to protect uncontaminated ground water even if that water is not currently used as a drinking water supply.

(3) State's Response. As to Reilly's W 23 proposal, the State would consider the proposed plan acceptable if it were revised such that Reilly pay the cost of the MWCC sewer hook-up. As to the gradient control system, a number of issues exist, most notably issues relating to monitoring wells. Finally, to be acceptable to the State, the contingent actions clause must be amended (1) to make it clear that Reilly must implement modifications required by the State or the United States to correct the impact of the gradient control system and (2) to revise the trigger relating to contingent actions.

(h) ST. PETER AQUIFER

(1) Brief Description. The remedial action plan for the St. Peter aquifer contains two main sections: monitoring requirements and contingent action requirements. The monitoring requirements are set out in 8.1. and include a provision requiring Reilly to conduct a feasibility study if monitoring demonstrates that concentrations in the monitored water exceed drinking water criteria for PAH. The contingent actions requirements are set out in 8.2. As Reilly has drafted it, the requirement allows the governments to require Reilly "to install and operate a gradient control well system [to control the contamination in the St. Peter]." This gradient control system is to consist of one or two gradient control wells. The governments are authorized to require the installation of the system "in order to protect actual or potential uses of the aquifer for drinking water."

(2) Explanation of Major Issues. The issues relevant to this aquifer are similar to those with the Prairie du Chien-Jordan, namely the trigger for contingent action.

(3) State's Response. The monitoring requirements for this aquifer are acceptable to the State. However, the contingent actions requirement need to be modified as indicated in the comments on the Prairie du Chien, above.

(i) DRIFT-PLATTEVILLE AQUIFER

(1) Brief Description. There is major contamination in the aquifer resulting from Reilly's activities. Although this aquifer is not a drinking water aquifer in this area, it provides recharge for other aquifers. Reilly proposes to install a single gradient control well. In addition, Reilly proposes to install monitoring wells and to sample these and existing wells in order to better define the extent of contamination in the aquifer. As

a contingency, Reilly proposes to intall additional gradient control wells or to increase the pumping rate at the first well if "monitoring in this area displays Drift or Platteville phenolics or PAH concentrations comparable to those within the capture area of the gradient control wells installed pursuant to" the gradient control requirement for this aquifer.

(2) Explanation of Major Issues. The major outstanding issue regarding this aquifer relates to the contingency section of Reilly's proposal. Reilly's proposal currently lists as a contingency the installation of additional gradient control wells. This description and Reilly's use of the language "comparable to" raise issues which in the view of the State must still be resolved.

(3) State's Response. Installation of additional gradient control wells should not be listed as a "contingency" (as a practical matter, the difference between listing it as a contingency and not so listing it is to raise unjustified questions as to the likelihood of occurrence). The term "concentrations comparable to" is unacceptable because existing data on the level of contamination near the site of the proposed gradient control well is inconclusive and if it is very high could result in a too limited a trigger for control. Additional data should be available soon from an investigation being planned by U.S. EPA.

(j) LEAKING MULTI-AQUIFER WELLS

(1) Brief Description. Leaking multi-aquifer wells allow contamination to flow from contaminated aquifers (especially the Drift-Platteville) into deeper aquifers which would otherwise be protected from contamination. Section 10 of the RAP addresses the problem created by the existence of these wells.

(2) Explanation of Major Issues. One major issue is whether multi-aquifer wells should be closed within the control area of a gradient control system (which would be presumably removing the contamination which enters the aquifer) or whether they should be allowed to continue to be a source of contamination for the deeper aquifers. Reilly proposes the latter. Another issue is the criteria for closing or reconstructing a well. The MPCA staff believes that any well leaking water above drinking water criteria should be fixed. Reilly proposes to limit the Commissioner's actions regarding well reconstruction to wells "which display interaquifer flow of water which exceeds drinking water criteria for PAH or 10 micrograms per liter phenolics that threaten actual or potential uses of the St. Peter aquifer for drinking water supply with respect to [specified criteria.]" In addition, Reilly's proposal seeks to place the burden of well closure on the owner of the well rather than on Reilly.

(3) State's Response. For the purposes of settlement only, the State is willing to entertain Reilly's proposal regarding closure of multi-aquifer wells, but prefers to have the wells properly closed or reconstructed now. For the reasons described earlier, Reilly's language limiting clean up to ground water used or potentially used for drinking water is not acceptable. Reilly's proposal to place the burden of well closure on owners of property also is not acceptable to the State.

(k) NEAR-SURFACE CONTAMINATION

(1) Brief Description. Several issues related to surficial pollution (as distinguished from ground water pollution) remain. These include contamination of areas south of the Reilly site and on the site itself. Reilly proposes to assign responsibility to the City for all near-surface contamination remedies.

(2) Explanation of Major Issues. An issue exists as to the proper disposal of contaminated soils at the site.

(3) State's Response. Excavated contaminated soils must be treated in compliance with applicable laws and regulations.

(l) CONTINGENT DRINKING WATER TREATMENT

(1) Brief Description. This section relates back to several earlier sections in that it establishes the requirements for action where monitoring demonstrates contamination at certain trigger levels.

(2) Explanation of Major Issues. The major issue in this section relates to the statement in 12.2.1 (applicability) that section 12 "shall apply if monitoring of active municipal drinking water supply wells in the Mt. Simon-Hinckley, IrontonGalesville, Prairie du Chien-Jordan, or St. Peter aquifers, . . . , indicates that untreated water from any such well exceeds the drinking water criteria for PAH at the point at which the water is introduced to the water distribution system."

(3) State's Response. The State's problem with the applicability statement is that the phrase "at the point at which the water is introduced to the water distribution system" could be interpreted as providing for assessment of the quality of the water (and the contaminants in the water) after it has been diluted with water from uncontaminated wells located at the same site. The State believes that the trigger for treatment should be tied to the concentrations of contaminants in the contaminated water before dilution.

(m) APPENDIX A: PAH COMPOUNDS TO BE MONITORED

(1) Brief Description. Appendix contains a list of PAH compounds to be monitored. The list is divided into two parts, one identifying "carcinongenic" PAH and the other identifying "non-carcinogenic" PAH. The classification of a PAH-compound as a carcinogen or a non-carcinogen may impact the contingent triggers for the remedial action at the site.

(2) Explanation of Major Issue. There may be an issue as to whether fluoranthene should be listed as a "Carcinogenic PAH" rather than as an "Other PAH." Reilly lists it as the latter; recent studies appear to indicate that it should be listed as the former.

(3) State's Response. The classification of fluoranthene needs to be reviewed in light of the more recent study. In addition, the governments must be afforded the opportunity to add PAH compounds to the carcinogen list as new information develops.

We hope this (relatively) brief explanation of the settlement issues before the parties will be of assistance to the Court in facilitating settlement discussions. Further explanation of the State's view as to the requirements of a remedial action program can be provided to the Court by staff of the Minnesota Pollution Control Agency.

Very truly yours,

STEPHEN SHAKMAN
Special Assistant
Attorney General

LISA R. TIEGEL
Special Assistant
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